

APPEAL NO. 93251

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). A Benefit Contested Case Hearing (CCH) was held on January 12, 1993 and the record closed on January 14, 1993. The claimant testified telephonically from the jail. His attorney, Ms D, was present at the hearing. The sole issue for the CCH was: "whether claimant suffered disability after incarceration and has disability to the present time." The hearing officer determined that the appellant, claimant herein, did not have disability resulting from an injury, after his incarceration on July 22, 1992 and continuing to the date of the CCH.

Claimant by an unsigned letter dated 3-30-93, postmarked March 31, 1993, wrote the Appeals Clerk, Texas Workers' Compensation Commission (Commission), Hearings and Review, asking why his income benefits checks had stopped on 3-27-93. In that letter, claimant referred to impairment ratings of 18%, 25% and 7% and then asks: "Now no check? its (sic) wrong what you all doin (sic) to me, cause I am in jail." Respondent, carrier herein, responds that 1) claimant's letter may not constitute an appeal; 2) "[a]ssuming the claimant received a copy of the decision . . . the Appeals Panel lacks jurisdiction . . . because the claimant's 'Request for Review' was not timely filed;" 3) carrier, "under the assumption" that the Appeals Panel would interpret the letter dated March 30, 1993, from claimant as a request for review responds that the decision of the hearing officer is supported by the evidence and requests we affirm the decision.

DECISION

We find that the appeal in this matter was not filed within the time limits required by Article 8308-6.41(a) and the decision of the hearing officer is the final administrative decision in this case. See Article 8308-6.34(h) of the 1989 Act.

The record reflects that the hearing officer's decision was distributed, by mail, on February 22, 1993. A copy of the decision was sent to claimant at a (city), Texas address (presumably that of claimant's mother) and to claimant's attorney. The first problem for consideration is whether mailing copies of the decision to the addresses indicated above constitutes service on the claimant who was then, and is now, in the jail. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE §§102.4(a) and 102.5(a) (Rules 102.4(a) and 102.5(a)) provide that all notices and written communications to the claimant shall "be mailed to the last address supplied." Rule 102.4(b) allows notices and reports to be mailed to a claimant's representative but notices of hearings and "orders of the commission shall be sent to the claimant" We interpret the "Decision and Order" of the hearing officer to be an order of the Commission. The last address supplied to the Commission was the (city), Texas, address where the Commission sent the decision. We would note that the Commission may have had actual knowledge that claimant was incarcerated, however, the last address supplied was the home address.

To further confuse the issue, the Appeals Panel is in receipt of another unsigned

letter from claimant dated 5-7-93, where claimant stated he had written "about a month ago" about his check being stopped and ". . . you wrote a letter to my house in (city), Texas, My Mother got the letter from you, but I have not got it yet from my Mother yet, to read it my self." Claimant refers to his attorney Ms D, a hearing in the Harris County jail ". . . and my check start back, and about 3 to 5 week later it was stop" Claimant states he called carrier's adjustor who told him that he (the adjustor) ". . . was told to stop it from the Commission" Claimant states he will be getting out of jail in June 1993 and ". . . if you have any letter to send me you can send it to me, if you want to, Ore (sic) keep send it to my house"

We find that the hearing officer's decision was properly sent to the last address supplied by the claimant and to claimant's attorney in accordance to Rules 102.4(a) and 102.5(a). Neither claimant nor claimant's attorney assert when the decision was received, therefore, the provisions of Rule 102.5(h) are invoked. That rule provides:

(h)For purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the commission shall deem the received date to be five days after the date mailed.

The decision in this case was mailed on February 22, 1993, and the "deemed" date of receipt was February 27, 1993. Article 8308-6.41(a) requires that an appeal shall be filed with the Appeals Panel "not later than the 15th day after the date on which the decision of the hearing officer is received" If the deemed receipt date was February 27, 1993, 15 days from that date would be Sunday, March 14, 1993. Applying Rules 102.3 and 102.7 which state that when the last day of filing is a Saturday, Sunday, or any other day on which the commission is not open for business, the period is extended to the next business day. Therefore, Monday, March 15, 1992, would be the statutory date by which the appeal must be filed. Claimant's unsigned letter dated 3-30-93 was postmarked March 31st and received April 2nd. Consequently the appeal was filed beyond the statutory 15 days required by Article 8308-6.41(a).

The purpose of claimant's 3-30-93 letter is not clear. Claimant emphasized his concern that his income benefits check had stopped, continued pain in his right knee and references he "was told that (he) will get (his) check for 54 weeks Now you all stop it." The reference to 54 weeks would appear to refer to an 18% impairment rating (i.e. 18% X 3 weeks = 54 weeks of impairment benefit income). Nowhere in the 3-30-93 letter does claimant reference the CCH. On the other hand, attached to the letter was a Texas Workers' Compensation Commission brochure entitled "Review of Claims Disputes by the Commission's Appeal Panel" together with an attempted certification of service. Under these circumstances we believe the letter was an effort to have the Appeals Panel review the case.

Claimant in his correspondence refers to his check. Claimant was apparently paid temporary income benefits (TIBS) from September 1991 until November 16, 1992, when the carrier suspended TIBS pursuant to an Interlocutory Order effective November 16, 1992. Apparently claimant was referring to the cessation of impairment income benefits (IIBS) in his letters of 3-30-93 and 5-7-93.

Claimant testified that he injured his right knee on August 12, 1991 while working for , the employer. Claimant testified his knee was treated for a month before he was referred to (Dr. J), who diagnosed a torn right medial meniscus and chondromalacia of the right patella and performed arthroscopic surgery on the right knee on October 23, 1991. The hearing officer fairly and accurately recounts claimant's continued medical problems with his right knee. Claimant's medical condition, and in most circumstances, disability which is defined as the inability to obtain or retain employment at the preinjury wage, would be factual determinations for the hearing officer. For purposes of this case it is sufficient to note that claimant was continuing to have pain, limited motion and swelling in his right knee and was under the care of (Dr. L) on July 22, 1992 when claimant was arrested and incarcerated in the Harris County jail, where he has remained to date. Claimant testified he has not received medical care for his knee during his incarceration. The Medical Division evaluated claimant for hypertension on August 8, 1992. The report of this evaluation noted claimant's height at five feet eleven inches and his weight at three hundred pounds. By letter dated January 8, 1993, Dr. L stated that claimant was last examined and evaluated on June 19, 1992 and based on his findings at that time, Dr. L opined that claimant's disability still existed and claimant would presently be unable to work because of his right knee injury.

The issue in this case is whether claimant's disability, as defined in Article 8308-1.03(16) as the inability to obtain and retain employment at preinjury wages, is because of the compensable injury or because of claimant's incarceration. This issue was comprehensively discussed in Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993, where the Appeals Panel distinguished the old law concept of lost earning capacity from the 1989 Act's economic concept of disability. In a similar factual circumstance, we held in Appeal No. 92674, *supra*, that the case must be decided under the definition of disability in the 1989 Act. TIBS are to replace lost wages due to a compensable injury. In this case claimant was unable to obtain and retain employment because he was incarcerated, rather than because of any compensable injury. Incarceration, and not the compensable injury, became the reason for the claimant's inability to obtain and retain employment at wages equivalent to the preinjury wage. Had we been required to do so, in the instant case, we would have affirmed the hearing officer's finding that claimant "has not established that his compensable injury, and not his incarceration, has been a producing cause of his inability to obtain and retain employment from July 22, 1992 to the date of this hearing."

Parenthetically we would note that while claimant currently does not have disability because of his incarceration, we have previously held that an injured employee can have intermittent periods of disability, so long as all the statutory requirements are met. See Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991 and Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992. Therefore when claimant is released from jail, perhaps in June 1993, disability may again become an issue, notwithstanding Dr. L's certification of MMI based on claimant's failure (because of his incarceration) to return for an examination.

In summary, the appeal was not timely filed, but even if it were, it appears that as a matter of law, claimant does not have disability, as defined by the 1989 Act, from July 22, 1992 until his release from incarceration.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge